



EMPLOYMENT TRIBUNALS

Claimant

Mr Daniel Kuma

Respondent

Asda Stores Limited

v

Heard at: Norwich

On: 10, 11, 12 & 13 August 2022

Before: Employment Judge Postle

Members: Mrs L Gaywood and Mr Davey

Appearances

For the Claimants: Mr Antwi-Boasiako, Solicitor

For the Respondent: Mr Rozycki, Counsel

JUDGMENT

1. The Claimant did not suffer unlawful deduction of wages during the period 22 June 2018 through to 24 May 2019.
2. The Claimant's claim that he was directly discriminated against because of his sexual orientation is not well founded.
3. The Claimant was not the subject of victimisation by the Respondent.
4. The Respondent did not fail in their duty to make reasonable adjustment.
5. The Claimant's claim that he was directly discriminated against because of his disability is not well founded.

REASONS

1. The Claimant brings claims (the remaining complaints) as set out at paragraphs 28(i)-(viii) set out at the Case Management Hearing before Employment Judge Ord on 16 October 2020 (pages 73 – 74 of the Bundle).

2. In this Tribunal we heard evidence on behalf of the Claimant through a prepared witness statement. For the Respondents we heard evidence from: Mr K Twardawa, Finance Manager; Mr D Preston, Operations Manager; and Mr A Baxter, General Manager of Brackmills Distribution Centre. All giving their evidence through prepared witness statements.
3. The Tribunal also had the benefit of a Bundle of documents consisting of 352 pages.
4. The Claimant was employed as a Warehouse Operative from December 2014 until May 2019 when he was dismissed on the grounds of ill health capability. The Claimant refers to historic allegations in 2006, at paragraphs 2 – 8 of his claim form, which the Claimant states amounts to direct sexual orientation harassment and victimisation. These allegations were the subject of a previous Employment Tribunal claim under case number: 3328523/2017, which was struck out by the Employment Tribunal on 16 February 2019 for non-compliance with an Unless Order dated 27 December 2018. Therefore, those claims were indeed excluded at the Case Management Hearing before Employment Judge Ord on 16 October 2020.
5. This in effect leaves the Claimant with two main allegations, that he suffered deduction from wages from June 2018 to May 2019 which the Claimant says amounts to direct sexual orientation discrimination, victimisation, direct disability discrimination and the failure to make reasonable adjustments; and that the Claimant's dismissal on the grounds of capability amounts to direct sexual orientation discrimination, victimisation and direct disability discrimination and the failure to make reasonable adjustments.
6. The Respondents have conceded that the Claimant has a disability, namely stress and depression and further, they had knowledge of the same at the relevant time.
7. The Respondents have a Handbook issued to all employees which is in effect a guide to what is expected of colleagues, particularly core values of behaviour, integrity and respecting other colleagues and customers and not to make judgements on protected characteristics.
8. The Respondents have a Sickness Absence Policy (pages 89 – 108), depending on the length of service an employee benefits from 13 weeks' company sick pay to 26 weeks pay. The Managing Long Term Sickness Policy is at page 99.
9. The Claimant was originally dismissed in December 2008 when he was unable to produce evidence of his right to work in the UK, subsequently reinstated in January 2019 when evidence was produced by the Claimant of his right to work in the UK. As a result of that, despite a break in continuity, HR nevertheless allowed the Claimant that his sick pay be

extended to the 26 week period which did cause an error in payroll calculations which was handled by Human Resources Shared Services in Leeds, not in the warehouse where the Claimant worked.

10. On 31 July 2016, the Claimant was signed unfit for work by his GP. Throughout the period following, the Claimant was invited regularly to welfare meetings to discuss ill health; not all of which he attended. The aim of which was to discuss what could be done to facilitate the Claimant's return to work. This continued until 16 January 2017 as work related stress totalling 169 days.
11. Thereafter, the Claimant was again signed off from 22 December 2017 to 19 April 2018, totalling 118 days.
12. Then 8 June 2018 to 25 June 2018, seven days, the Claimant was signed off work with work related stress.
13. Then 5 September 2018 to 18 October 2018, 43 days, the Claimant was signed off work with pain in the thumb.
14. From 8 January 2019 to 30 May 2019, approximately 142 days, the Claimant was signed off work with mental stress.
15. Therefore, for the period August 2016 until the Claimant's dismissal on 30 May 2019, the Claimant had been absent for various reasons for 480 working days.
16. As a result of the Claimant's long term absence and in accordance with the Long Term Sickness Policy, Ms Hersey, HR Business Partner, met with the Claimant on 29 January 2018 having previously referred the Claimant for an Occupational Health Review (page 221), which noted,

"As you are aware Daniel is currently under the care of the Mental Health Team and is being reviewed by a psychiatrist and psychologist on a regular basis. He tells me that he is currently living with a friend who is caring for him. His appetite has reduced, he has no motivation to leave the house and his sleeping is disrupted. He is on medication which is constantly being reviewed by the Mental Health Team. He is under the care of a Crisis Team that says he has been discharged from their care. He reports low mood, anxiety and voices in his head.

Daniel engaged well in consultation, giving a good history and answering questions. He is being treated for severe depression and anxiety and letters from his psychologist were seen. He is on appropriate medication for his condition, with his medication being changed and reviewed by the Mental Health Team. He completed a well validated Mental Health Evaluation and his scores would indicate severe depression and anxiety. It would appear that his symptoms are impacting his activities of daily living and he is

requiring support from his friend to maintain his day to day living. From the history taken he is currently unfit to be at work and is likely to remain unfit until his condition has stabilised. It is difficult to say when this will be.

Having completed a well validated Mental Health Evaluation. Daniel will require further intervention in order to resume a level of well being consistent with a return to work. He is currently under the care of a Mental Health Team and is being reviewed on a regular basis. At this stage it is not possible to comment on the benefits of a change of shift as Daniel is unfit to be in work. It is hoped that with his ongoing treatment the condition will improve but it is difficult to say when this will be. It may be appropriate prior to return to work to complete a 'stress risk assessment'. The standard HSE Stress Risk Assessment with guidance or the HSE Assessment will assist in identifying what is positive about work as well as what stressors the employee perceives. The tools that could be useful would be completing the 'Wellness Action Recovery Plan' with his Manager reviewing this with him every few weeks. The WRAP plan can be found in OHIO in the Help Guidance for Customer section."

17. Ms Hersey met the Claimant on 29 July 2018 and it is clear they discussed how the Claimant felt that he was not in a good place, seeing a specialist psychologist who was able to help him with his thoughts that he was currently having. They discussed further the return to work and possible options; namely,

- *"There are two colleagues that you trust on night shift, we talked through the possibility of matching your rota with these colleagues to ensure you always work a shift with these colleagues present";*
- *"We talked through buddying you with the two colleagues mentioned so you will work close by should you need support";*
- *"We discussed changing shifts which you advised this was not an option at present"; and*
- *"We discussed a phased return over a period of time to help you settle back in".*

Finally, Ms Hersey having talked through the options advised that it would be beneficial for the Claimant to talk these options through with his psychologist and that there would be a catch up in the weeks following to discuss effectively the way forward. The meeting would take place at the Claimant's home around February 2019.

18. Ultimately, a meeting appears to have taken place in March 2019 as there is a note of a discussion between Ms Hersey and the Claimant on 6 March 2019 and the Claimant's Trade Union Representative. At which it would

appear from Ms Hersey's note that those colleagues whom the Claimant had complained about as bullying and harassing were no longer in the workplace, as confirmed by the oral evidence of Mr Baxter, particularly Glen Barnes had stepped down and Martin Hawthorne was no longer in the warehouse.

19. Following this, the Claimant remained off work.
20. In or about March 2019, the Finance Manager Mr Twardawa was notified by Ms Hersey that the Claimant was raising concerns that his pay in the last tax year was incorrect. Mr Twardawa investigated this by going through all the Claimant's pay slips since April 2018 to see what had been paid and then consideration of time sheets, holiday and periods of sickness. Mr Twardawa also looked at the tickets raised by HR Shared Services in Leeds in relation to the Claimant's pay (pages 322 – 325).
21. As a result of Mr Twardawa's investigation, he found that from April 2018 to April 2019 the Claimant should have been paid £24,153 gross, but actually received £21,064 and therefore there was a balance owing of £3,089 which is set out at page 326 of the Hearing Bundle.
22. The reason for these discrepancies are:
 - 22.1 there were occasions when the Claimant was paid holiday pay at the incorrect rate;
 - 22.2 there were occasions where the Claimant was not paid the night shift premium rate;
 - 22.3 there were occasions when the Claimant's fit notes were not processed on time, causing the payment of sick pay to be delayed and paid in the wrong pay period;
 - 22.4 there were occasions when company sick pay was not paid due to the Claimant exhausting his entitlement to it, however, the former HR Business Partner at the Depot at the time had subsequently taken the discretionary decision to extend the Claimant's entitlement by another 13 weeks so that he should have been back paid for this sum (the breakdown is further set out at page 309 – 321); and so
 - 22.5 the total underpayment therefore being of £3,777.62.
23. However, on 17 August 2018 the Claimant received an additional payment of £410 and on 7 December 2018 the Claimant received an additional payment of £288.58 (page 326). As such set against these additional payments, the Claimant was owed £3,088.94.

24. One of the additional payments was back paid for the company sick pay that was not paid in the correct pay period. The other was for two weeks' pay in respect of a period when the Claimant did not attend work and did not have a fit note signing him off on sickness absence to cover this period. The Claimant was therefore not paid for this at the time, however, again, Ms Hersey had agreed to retrospectively pay the Claimant for this period and class it as paid authorised absence.
25. In order to correct this, the Claimant had already been paid an additional £1,471.58 on 26 April 2019. On 30 April 2019, at the end of Mr Twardawa's investigation he raised several tickets with HR Shared Services in order to arrange for the outstanding amount to be paid. The Claimant was therefore paid an additional sum of £1,617.12 on 24 May 2019, taking the total to £3,088.70 in total. These pay slips can be seen at page 346 of the Hearing Bundle. It would appear from this the Claimant has been paid all outstanding pay in full.
26. The colleagues used a 'clocking in' system, therefore wages were calculated systematically as were holiday pay without human intervention and would be processed at the HR Shared Services in Leeds.
27. The Claimant continues to be absent throughout April 2019 and in doing was coming to the end of his 26 weeks' company sick pay.
28. On 13 May 2019, Mr Preston (page 232) invites the Claimant to an 'Ill Health Capability Review' meeting to discuss ongoing health and the impact the Claimant's health was having on his ability to carry out his role as a Warehouse Operative, him being absent since 8 January 2019.
29. The letter makes it clear that at the meeting the following will be discussed:
 - Occupation Health's opinion on your absence and condition;
 - Content of any GP / Specialist's Report;
 - Discuss the possibility of any alternative duties, vacancies and / or adjustments in employment;
 - Any EEA recommendations if applicable;
 - Impact of the continued absence on the business; and
 - The purpose of the meeting was said it would be to fully review the absence to date, review all adjustments that had been considered and any suggestions the Claimant may have, exhaust all other alternatives which may assist the Claimant's return and then make a decision regarding the Claimant's continued employment, which may result in the Claimant's employment being terminated.

30. The letter went on to advise the Claimant of his right to be represented by a GMB Steward or a Depot colleague and a date was set for the meeting of 15 May 2019.
31. The meeting was ultimately rescheduled at the Claimant's request for 17 May 2019. The minutes of that meeting are at page 257. The Claimant was accompanied by his Trade Union Representative. The Claimant having been signed off from 1 April 2019, a period of 3 months to 30 June 2019 and the reason was mixed anxiety and depression. Before the Capability Hearing the Claimant visits his GP and persuades his GP to sign a fit note saying,
- “Daniel would like to return to work on 16 May 2019 on a phased return basis in order to assess suitability to return on a full time basis.”*
32. That fit note was dated 13 April 2019. This time it recorded a further two conditions the Claimant had; these being: personality disorder, stress at work and visual hallucinations.
33. The meeting went ahead on 17 May 2019, confirmed that the Claimant had exhausted the company's sick pay and discussed the Claimant's recent fit note as referred to above and the Claimant was still claiming that the Respondents were responsible for his condition as a result of the Claimant's allegation that he had been bullied. The Claimant confirmed he had suffered panic attacks recently and confirmed his current mental health and stress was the worst it had ever been. He confirmed that prior to going off sick he had had hallucinations, was seeing people, hearing voices and had been taken to hospital in the middle of the night shift. It was said that the managers were not trained to deal with mental health issues such as the Claimant had. The Claimant indicated that although he was suicidal, if he returned to work he would want managers to keep an eye on him and if necessary take him to hospital again in their cars if he had any form of episodes.
34. The meeting was adjourned to consider the Claimant's position and an Occupational Health Referral. The Occupational Health Referral did not take place as a result of the Claimant's confidentiality issues the day it was due to take place, namely 30 May 2019, as a result of an Assessment Team visiting the Claimant that day to assess him which meant the Occupational Health Referral could not take place.
35. The Capability Review meeting was therefore reconvened on 30 May 2019 (page 278) with the Claimant and his Trade Union Representative present and again the issues to be discussed were canvassed at the meeting and Mr Preston considered after careful consideration, noting the following:-

“You have been absent from work since 8 January 2019 following a meeting with the site's Occupational Health, the Report advised that you require further intervention in order to resume the level of well

being consistent with a return to work and you are currently under the care of the Mental Health Team and is being reviewed on a regular basis.

This appointment was called following unpredictable behaviour at work where you had hallucinations and was shouting at the Shift Manager to get the people away from you when there was no one else present. This was covered in the previous meeting on 17 May 2019 where you informed us that the Management Team have had to take you to Berrywood Mental Health Hospital and A & E on several occasions due to your behaviour at work. I asked if you expected Asda to get a Mental Health Specialist in on nights to supervise you and you said, "no, my managers can take me to hospital as they know my condition".

You have said that your psychologist advised a phased return to work two hours for four weeks, then four hours after four weeks until further notice depending on your health with a review with your psychologist to see how you are getting on.

I asked about your treatment since you went off sick based on the Occupational Health advice and you said your treatment has not improved your condition. You said on 17 May 2019 that you have had a panic attack on the Monday of that week and you had to go to hospital. You said there is no cure for your mental condition, when I asked is your condition the same as when you went off you replied, "no, worse". You went on to say that you have now developed PTSD. You have also said you have attempted suicide on more than one occasion and you harm yourself...

We adjourned the previous meeting on 17 May 2019 as I needed to weigh up what you have said is known with your condition that is not yet treated,

- *you hear voices;*
- *you see things that are not there;*
- *you harm yourself;*
- *you have attempted suicide;*
- *you expect managers to take you to hospital should you have an episode;*
- *your Doctors want to see if ARTW could help you in your recovery, not will help you;*
- *your psychologist wants to try you on two hours per day for four weeks, then four hours with regular reviews; and*
- *you have said you personally feel that your mental health is worse than it has been since you went off.*

From what you have said, I requested you attend the meeting with the Occupational Health and a letter was sent to you on 22 May 2019 for 30 May 2019 at 10:15. You did not say that you were unable to attend this meeting. During this meeting you advised that at the OHA you stated you had to go and answer the door as you had an Assessment Team coming to assess you. The meeting was then ended due to confidentiality concerns as your carer plus the Assessment Team was present.

Your current fit note is from 13 May 2019 and due to the following conditions:

- *personality disorder;*
- *mixed anxiety depressive disorder;*
- *stress at work; and*
- *currently reporting visual hallucinations...*

Due to what you have outlined above I am unable to offer amended hours or roles as I have a duty of care to my Managers and colleagues on site;

- *Nothing you have said leads me to believe your condition is any better than when you were advised to take time off by the site Occupational Health back on 8 January 2019;*
- *You have said you feel mentally worse than when you first went off sick;*
- *You can't say that should you return you would be better than when you went off;*
- *The GP has said you have requested to return to work, this was not advice given directly by your GP;*
- *Your psychologist wants to see how you cope at work, which we are not equipped or trained to deal with such complex cases of mental health;*
- *You expect the Managers to take you to the Mental Health Hospital should you have an episode;*
- *You have nothing from any trained medical practitioner saying you are better; and*
- *Despite several requests to meet with your Carers and Support Workers, nobody on site has ever spoken with them to try and support you back into the workplace.*

I am concerned that following various conversations with the Managers on site, you have stated that a trigger to your condition is due to past events within the workplace and one of your stressors is stress at work. This is also one of the reasons you have not been able to return due to stress at work and you have tried to work

these issues through with our HR Business Partner without success on your part.

Based on these findings, I do not believe that your condition has improved since your meeting with Occupational Health on 8 January 2019. You have yourself informed me that you are worse than you have ever been and it is my belief that if you return to work that this will not be sustainable as you have yourself reported that it is work that triggers these episodes and you experience flash backs within the workplace. You have not been able to engage with our Occupational Health to help support you back into the workplace and you have not been forthcoming with communication with external Carers and Support Workers despite being asked on several occasions to help facilitate your return to work. It is clear from several meetings that you have had with our Management Team that several attempts have been made to support you back to work with no success. It is therefore with regret that I advise that I have regrettably reached a decision to terminate your employment on the grounds of capability due to ill health. You have the right to appeal my decision, this should be in writing to Ms Hersey stating the grounds you appeal within seven days from the date of this letter.

*Signed
Mr D Preston, Operations Manager”*

36. The Claimant lodged an Appeal by letter undated (page 288 - 289). This was acknowledged by HR on 7 June 2019 (page 291) and invited the Claimant to an Appeal Hearing on 5 July 2019 setting out the purpose of the Appeal to consider the Claimant’s grounds and where appropriate to consider any new evidence. The letter also confirmed the Claimant’s right to be accompanied.
37. The Appeal Hearing ultimately took place on 12 July 2019 before Mr Baxter the General Manager. At this meeting the Claimant was accompanied by his Trade Union Representative and also the Claimant’s Carer. The Claimant’s grounds for appeal were put on four grounds, namely,
 - 37.1 his dismissal was retaliation by the company for raising a claim at the Employment Tribunal;
 - 37.2 his current condition was a result of discrimination, harassment and bullying he received when he was employed by Asda;
 - 37.3 it was unreasonable to dismiss him when the company could provide a phased return to work which would over time allow him to return to full duties; and
 - 37.4 he was discriminated against because of his disability.

38. It is important to note that Mr Baxter had no prior knowledge of the Claimant or involvement in the case and was more senior than the Manager who made the decision to dismiss the Claimant.
39. Each of the Claimant's grounds for appeal were dealt with by reasons in Mr Baxter's outcome letter of 18 July 2019 in which the appeal was not upheld.
40. Unusually there is a second right of appeal which the Claimant was notified of in the outcome and he declined to pursue a second appeal. The outcome letter of 18 July 2019 setting out the reasoning is at page 298 – 299 of the Hearing Bundle.

The Law

Sexual Orientation – s.12 EqA 2010

41. It is clear that the Equality Act 2010 ("EqA") under s.12 covers sexual orientation, the Claimant being a male homosexual.

Direct Discrimination – s.13 EqA 2010

42. S.13 EqA 2010 states that an Employer directly discriminates against person if he treats that person less favourably than he treats or would treat others, and the difference in treatment is because of a protected characteristic. Therefore direct discrimination can be broken down into three headings,
 - less favourable treatment;
 - comparators; and
 - because of a protected characteristic.
43. The burden of proof is that once a Claimant proves facts on which the Tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, the Tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate.

Burden of Proof – s.136 EqA 2010

44. In order to claim direct discrimination under s.13 the Claimant has to show he has been treated less favourably than an comparator who was in the same, or not materially different circumstances to that of the Claimant.

45. In these proceedings it is not clear whom the Claimant relies upon as no direct comparator has been named, therefore the Tribunal have proceeded on the basis of a hypothetical comparator.
46. The direct discrimination relied upon is the alleged deduction from wages and the Claimant's dismissal.

Victimisation – s.27 EqA 2010

47. To succeed in bringing a claim of victimisation, the Claimant must show that he or she was subjected to the detriment because he or she did a protected act because the employer believed he had done or might do a protected act.
48. In this case the protected act relied upon by the Claimant is the previous claim issued by the Claimant against the Respondents which was ultimately dismissed.
49. The Claimant asserts that he was victimised, again in respect of the unlawful deduction of wages and the decision to terminate his employment.

Failure to make Reasonable Adjustments – s.20 EqA 2010

50. An employer has a duty to make reasonable adjustments under, s.20 EqA 2010, for a disabled employee if the employer has a provision, criterion or practice (PCP) which puts the disabled person at a substantial disadvantage in comparison with a person who is not disabled to remove that disadvantage.
51. In considering what is reasonable, it is necessary to have regard to:
 - i. the extent to which taking the step would remove the disadvantage;
 - ii. whether it would be practical;
 - iii. whether the financial cost incurred and the extent to which the employer's activities would be disrupted;
 - iv. the employer's financial and other resources;
 - v. the availability of a system; and
 - vi. the nature of the Respondent's activities and size of the undertaking.
52. The Codes of Practice statute gives some guidance to what is likely to be considered as a reasonable adjustment.
53. There must be knowledge of the disability and knowledge that the contended adjustment would remove or reduce the disadvantage for a duty to make reasonable adjustments to accommodate it to exist. In this case, the issue of knowledge is conceded by the Respondents.

54. The test of reasonableness imports objective standards. The question must not be looked at only from the perspective of the Claimant. The Tribunal must also take into account wider implications including operational objectives of the employer.

Conclusions

Unlawful Deduction of Wages

55. It is accepted that there were difficulties and problems over the Claimant's wages in the tax year following April 2018. Particularly in March 2019, the Finance Manager Mr Twardawa was informed by Ms Hersey of HR that the Claimant raised concerns about his pay being incorrect. As a result of Mr Twardawa's detailed investigation, he found that from April 2018 to April 2019 the Claimant should have been paid £24,153 gross, but in actual fact received £21,064 and there was an outstanding balance of £3,089. Mr Twardawa found that the reasons for these discrepancies were that the Claimant was paid holiday pay at the incorrect rate, on occasions the Claimant was not paid the right night shift premium and on other occasions when the Claimant's fit notes were not processed on time this caused the payment of sick pay to be delayed and paid in the wrong pay period. Finally, there were occasions when company sick pay was not paid due to the Claimant exhausting his entitlement to it. However, the former HR Business Partner at the Depot the Claimant was employed at had taken the decision to extend the Claimant's entitlement by another 13 weeks but unfortunately this had not been processed by the office that dealt with pay in Leeds.
56. In that respect, the office that did deal with pay was HR Shared Services at Leeds, not where the Claimant was employed and they would have had no knowledge whatsoever of the Claimant's previous proceedings against the Respondent, or the fact that of the Claimant's sexual orientation.
57. In those circumstances the Claimant cannot show that he was being treated less favourably because of his sexual orientation, nor could he show that he was being victimised. That claim therefore fails.

The Failure to Make Reasonable Adjustments

58. The Claimant says that the Respondent failed to provide him with the necessary support to cope in the workplace, that being the PCP relied upon.
59. The Claimant has serious mental health issues which were impacting on his day to day activities, he was under the guidance of a Mental Health Team and had serious depression involving, amongst other things, hallucinations.

60. Investigations had taken place into allegations that the Claimant was being bullied because of his sexual orientation. By March 2019, it would appear those persons were no longer employed in the workplace where the Claimant worked and this was confirmed by the oral evidence of Mr Baxter in these proceedings.
61. Given the nature of the Claimant's serious mental health condition and the fact that he was being regularly reviewed under the company's Long Term Absence Policy, there were meetings with HR of which some the Claimant did not wish to attend. In January 2018 his medication was constantly being reviewed by the Mental Health Team he was under; he was currently unfit to be at work and he was likely to remain unfit to work until his condition stabilised. In those circumstances and having the benefit of Occupational Health Reports, it was difficult to see what reasonable adjustments, if any, the Respondents could have done to assist in the Claimant's return to work.
62. A further meeting in July 2018 in which various options were discussed, it was left that the Claimant was to talk through the options being put forward with his psychologist and be discussed at a later stage. A meeting did take place in March 2019, at which the issue of bullying and harassment was discussed and those responsible were no longer in the workplace. However, the Claimant still remained off work and indeed unfit to attend work through mental illness.
63. There was simply no reasonable adjustment, right up until the time the Claimant was dismissed, that could have been offered that would have helped the Claimant return to work given the nature of his illness. In fact by 30 May 2019, the date when the Claimant was dismissed, the Claimant had been absent 480 working days since August 2016.
64. Finally, a suggestion by the Claimant that if he returned to work and had hallucinations again as he previously had, the Managers could simply take him to the nearest Hospital in their own car was unrealistic and not feasible. Managers are not trained in dealing with such mental health issues in the workplace and further it presented a Health and Safety issue for the Managers concerned. Previously, the Claimant had, had hallucinations in which he thought people were attacking him and had to be moved from the workplace by a Manager and taken to the nearest Mental Health Hospital. This is simply not realistic that would be a reasonable adjustment expecting Managers to deal with the Claimant in such a way.
65. In those circumstances the suggestion and claim that the Respondents failed to support the Claimant and make appropriate reasonable adjustments is not well founded.

The Dismissal Itself

66. On 31 July 2016, the Claimant had been signed unfit for work by his GP. Throughout the period following, the Claimant was invited to regular meetings to discuss his ill health, not all of which the Claimant attended. This continued until 16 January 2017 as work related stress, totalling 369 days.
67. The Claimant was then signed off from 22 December 2017 until 19 April 2018, a further 118 days.
68. On 8 June 2018 to 25 June 2018, the Claimant was signed off with work related stress.
69. On 5 September 2018 to 18 October 2018, there was a further period of 43 days that the Claimant was signed off with pain in the thumbs.
70. In January 2019 to 13 May 2019, approximately 142 days, the Claimant was signed off with work related stress.
71. Therefore, for the period August 2016 until the Claimant was dismissed on 30 May 2019, the Claimant had been absent for various reasons for 480 working days.
72. As a result of the Claimant's long term absence and in accordance with the company sick pay, HR met with the Claimant on 29 January 2018 having previously referred the Claimant for an Occupational Health Report, which had noted at that stage,
 - *"Daniel is currently under the care of the Mental Health Team and being reviewed by a psychiatrist and psychologist on a regular basis;*
 - *Is currently under the care of the Crisis Team;*
 - *Is being treated for severe depression and anxiety;*
 - *Currently unfit to be at work and is likely to remain unfit until his condition has stabilised".*
73. There was a further meeting in July 2018. Again it was discussed the Claimant was not in a good place and was seeing a specialist psychologist. Also in that meeting possible options were discussed which the Claimant was to discuss with his psychologist. A further meeting took place in March at which it was confirmed that those that the Claimant had said had been bullying and harassing him, were no longer at the Claimant's workplace.
74. However, the Claimant remained off work and on 13 May 2019, Mr Preston in accordance with the Ill Health Capability Review procedure, invited the Claimant to a meeting to discuss his ability to carry out his current role as a Warehouse Operative. The letter made it clear the matters to be discussed would be:

- Occupational Health Reports;
 - the contents of any GP / specialist Reports;
 - alternative roles;
 - the impact on continued absence in the view of absent any alternative;
 - the letter confirmed the right to be accompanied; and
 - that there was a possibility the meeting could lead to the Claimant's dismissal.
75. The meeting went ahead on 17 May 2019 in which all the points were discussed. In particular, the Claimant confirmed he suffered panic attacks and that his current mental health and stress was the worst it had ever been, the fact that prior to going off sick he had had hallucinations, hearing voices and had to be taken to hospital in the middle of the night by the night shift.
76. Ultimately, the meeting was adjourned. There was to be another Occupational Health Review, unfortunately this did not take place because the date it was due to take place the Claimant was undergoing an assessment from his own Mental Health Team and Occupational Health could not carry out the Review.
77. The Capability Review meeting was therefore reconvened on 30 May 2019 with the Claimant's Trade Union Representative present. Again, the whole area of the Claimant's absence and current mental health was discussed, particularly the Claimant's present condition and the fact, in summary, that the Claimant's own view was that his mental health was worse than it had ever been and that it appeared there was no likelihood of the Claimant returning to work in the foreseeable future. It is clear that Mr Preston reviewed all the available evidence and came to the conclusion, as set out in his Dismissal Letter dated 31 May 2019 (pages 285 – 287), to terminate the Claimant's employment on the grounds of capability due to ill health as there appeared nothing the Respondents could do to assist the Claimant's return to work and the fact that the Claimant himself believed that his condition at this stage was the worst it had ever been.
78. The Claimant was given the right to Appeal, which he duly did. The Claimant's grounds for appeal were clearly addressed by Mr Baxter who had no prior knowledge of the Claimant and decided to uphold the dismissal for the reasons that were set out clearly in the Outcome Letter of 18 July 2019.
79. It is therefore quite clear that the reason for the Claimant's dismissal had nothing to do with the Claimant's sexual orientation. He had been absent for a considerable period of time over the last three years, he clearly was not for the foreseeable future going to return to work, the Claimant had been consulted with throughout the last few years, there was detailed medical evidence establishing the nature of the illness and how it affected the Claimant, including a future prognosis. There was simply no other alternatives within the Respondent's business that could accommodate the Claimant.

80. The Claimant's dismissal was therefore not unfair and was not due to the Claimant's sexual orientation or an act of victimisation in relation to the Claimant having brought previous proceedings against the Respondents. That claim therefore fails.

Employment Judge Postle

Date: 19 January 2023

Sent to the parties on: 25 January 2023

For the Tribunal Office.